



HONG LEONG BANK BHD v. WONG SOON FONG

**COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI FCJ
MOHAMED APANDI ALI JCA
ANANTHAM KASINATHER JCA
[CIVIL APPEAL NO: A-02-2482-2009]
1 AUGUST 2012**

COMPANY LAW: *Winding-up - Charges - Charges in favour of bank created three months prior to winding-up - Whether void for “undue preference” - Whether contravened ss. 223 and 293 Companies Act 1965 - Whether also contravened s. 53(1) Bankruptcy Act 1967*

Held:

Allowing appeal; setting aside decision of High Court allowing liquidator’s motion to declare charges invalid.

Annotation:

- (1) Based on the provisions of ss. 223 and 293 of the Companies Act 1965, and s. 53(1) of the Bankruptcy Act 1967, a transaction in the nature of the two charges created by ONR in favour of the appellant bank here may be rendered void if the respondent was able to satisfy the fire conditions as stated in *Sime Diamond Leasing (Malaysia) Sdn Bhd v. JB Precision Moulding Industries Sdn Bhd*.
- (2) As for condition (1) - That transaction must take place within six months prior to the winding up - to fulfill the condition, it is necessary for the respondent to establish that the two charges were created after 9 February 1999. The facts however showed that the charges were created on 27 and 29 of May 1999, ie, on dates which fell well before 9 February 1999. It follows that ss. 223 and 293 of the Companies Act and s. 53(1) of the Bankruptcy Act do not extend to the two charges created by ONR in favour of the appellant. On this ground alone, the respondent’s motion ought to have been dismissed.



Case(s) referred to:

Lian Keow Sdn Bhd (In Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 1 LNS 44 SC (refd)

Sime Diamond Leasing (Malaysia) Sdn Bhd v. JB Precision Moulding Industries Sdn Bhd [1998] 4 CLJ 557 FC (refd)

Legislation referred to:

Bankruptcy Act 1967, s. 53 (1)

Companies Act 1965, ss. 223, 293

For the appellant - Shamala Balasundram; M/s Chooi & Co

For the respondent - Noorazmir Zakaria; M/s Aziz Zakaria Shaiful & Wan

[Appeal from High Court, Ipoh; Companies (Winding-up) No: 28-54-1999]

JUDGMENT

Anantham Kasinather JCA:

Background Facts

[1] The appellant bank provided loan facilities in the aggregate sum of RM51,700,000 (the loan facilities) in favour of Orient Apparel Berhad (OAB).

[2] In consideration of the appellant bank agreeing to grant the loan facilities in favour of OAB, a subsidiary company of OAB namely Orient Nature Resources Sdn Bhd (ONR) agreed to provide security by creating a third party charge in favour of the appellant bank in respect of two properties of which ONR was the registered proprietor.

[3] Pursuant to the aforesaid agreement, ONR created a third party “first charge over the property under Geran 31017, Lot 1268, Mukim of Empang Pecah (‘property 1’) and a second third party charge over the property held under Geran 25416, Lot 15094,



Mukim of Teja ('property 2'). The charge over property 1 was registered on 29 May 1998 and the charge over property 2 registered on 27 May 1998.

[4] A winding up petition was presented against ONR on 9 August 1999 and ONR wound up on 14 December 1999. It is not in dispute that by reason of the retrospective nature of the winding up order, ONR is deemed to have been wound up on 9 August 1999.

[5] A petition to wind up OAB was filed on 4 August 1998 and OAB wound up on 6 December 1998 in Ipoh High Court Winding Up Petition No: 28-60-1998. An application was thereafter made by the liquidators of OAB *inter alia* seeking a declaration that all properties of OAB pledged as security for the loan facilities were void for contravention of s. 223 of the Companies Act 1965, s. 293 of the Companies Act 1965 to be read with s. 53 (1) of the Bankruptcy Act 1967 (see p. 229 of bahagian C jilid 3). The liquidator's application was dismissed by Justice James Foong (as he then was) in a written judgment dated 11 September 2001 (see pp. 226 to 257 of bahagian C jilid 3).

The Liquidator's Case

[6] By a notice of motion filed in the Winding Up Petition No: 28-54-1999, the liquidators of ONR *inter alia* sought a declaration that the charges created over property 1 and property 2 were invalid as against the respondent liquidator. The remaining prayers in the notice of motion were for consequential relief such as the rectification of the records maintained at the land office to cancel the two charges created in favour of the appellant bank in respect of the aforesaid two properties belonging to ONR (see p. 27 of bahagian A jilid 1). This motion was supported by the affidavit of Mr. Wong Soon Fong, the liquidator appointed by the court following the winding up of ONR. Mr. Wong who was also the liquidator of OAB, in this affidavit, relied on two grounds in support of the orders sought by him in the motion. The first was that OAB experienced financial difficulties in settling its debts in the period between the end of 1997 and throughout the year 1998. Secondly, that since OAB was wound up on 4 August 1998 and the charges in favour of the appellant bank created in May 1998, the



charges were void for undue preference in that the appellant bank was preferred as a creditor when compared to the other creditors of OAB (see paras. 10 and 11 of Bahagian B Jilid 2). To the extent that this preference took place less than six months before the winding up of OAB on 4 August 1998, Mr. Wong alleged that the charges created in respect of property 1 and 2 were void under the relevant sections in the Companies and Bankruptcy Act 1967.

The Appellant's Case

[7] The appellant's case simply put was that there is nothing in the affidavit of Mr. Wong to the effect that ONR was insolvent for the period of six months prior the winding up of ONR. The allegation in para. 7 of the supporting affidavit is that OAB was experiencing financial difficulties but not that it was insolvent. In any event, the financial difficulties experienced by OAB were irrelevant since the obligation of the respondent was to establish insolvency on the part of ONR and not OAB. The court being concerned with whether ONR had preferred the appellant bank as a creditor when compared to other creditors. That, in any event, Justice James Foong (as he then was) in the earlier proceedings commenced by the same liquidator had found as a fact that there was insufficient evidence that OAB was insolvent at the material time (see p. 255 of bahagian C jilid 3).

[8] Secondly, learned counsel for the appellant also contended that there is no evidence in the supporting affidavit that the appellant bank is a creditor of ONR. The evidence being that ONR had executed a charge in respect of property 1 and 2 by way of security for the loan facilities granted by the appellant bank to OAB. In other words, the appellant bank was a creditor of OAB but not ONR. According to the counsel for the appellant for the relevant sections of the Companies and Bankruptcy Act to be applicable, there must be evidence of the appellant bank being preferred to other creditors of ONR. The affidavit affirmed by Mr. Wong in support of the motion in para. 4 acknowledges that the facilities were granted to OAB albeit as the parent company of ONR. Finally, the supporting affidavit does not make any reference to ONR having any other creditor thereby excluding its claim that it had preferred the appellant to its other creditors.



Decision Of The Court

Applicable Law

[9] The issues raised by the respondent liquidator of ONR involves an interpretation of ss. 223 and 293 of the Companies Act 1965 to be read with s. 53(1) of the Bankruptcy Act 1967. These are set out below:

Section 223 of the Companies Act 1965:

Avoidance of dispositions of property, etc.

Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the court shall unless the court otherwise orders be void.

Section 293 of the Companies Act 1965:

‘Undue preference

- (i) Any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company which, had been made or done by or against an individual, would in his bankruptcy under the law of bankruptcy be void or voidable shall in the event of the company being wound up be void or voidable in the like manner.
- (ii) For the purposes of this section the date which corresponds with the date of presentation of the bankruptcy petition in the case of individual shall be:
 - (a) In the case of windup up by the court:
 - (i) The date of presentation of the petition’.

Section 53(1) of the Bankruptcy Act 1967 declares:

Avoidance of preference in certain cases

- (i) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred and every judicial proceeding taken or suffered by any person unable to pay his debts, as they become due, from his own money in favour of any creditor or any person in trust for any creditor shall be deemed to have given such creditor a preference over other creditors if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within six months after the date of making, taking, paying or suffering the same and every such act shall be deemed fraudulent and void as against the official assignee.

[10] These sections were considered by the Federal Court in the case of *Sime Diamond Leasing (Malaysia) Sdn Bhd v. JB Precision Moulding Industries Sdn Bhd* [1998] 4 CLJ 557; [1998] 4 MLJ 569. Edgar Joseph Jr FCJ (as he then was) delivering the judgment of the court opined that for a transaction to be held to be void for undue preference pursuant to the aforesaid three sections, the applicant would have to satisfy five conditions. These being:

- (a) That the transaction in question took place within six months prior to the commencement of winding up of the company;
- (b) That it satisfies the description of one of the types of transaction mentioned in s. 53(1) of the Bankruptcy Act 1967;
- (c) That the transaction took place at a time when the company was insolvent;
- (d) That the person in whose favour the transaction was effected was a creditor of the company; and

- (e) The effect of the transaction was to confer on to that person ie, (the creditor) a preference, priority, or advantage over other creditors in the winding up.

(see *Sime Diamond Leasing (Malaysia) Sdn Bhd v. JB Precision Moulding Industries Sdn Bhd* at pp. 579A-579D and *Lian Keow Sdn Bhd (in liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 1 LNS 44; [1988] 2 MLJ 449 at p. 452F)

Applicable Period

[11] Based on the aforesaid three provisions in the Companies Act 1965 and the Bankruptcy Act 1967, a transaction in the nature of the two charges created by the ONR in favour of the appellant bank may be rendered void if the respondent was able to satisfy the aforesaid five conditions pronounced by Edgar Joseph Jr J. For the purposes of condition (1) set out in His Lordship's judgment, it is necessary for us to ascertain if the charges were created within a period of six months of ONR being wound up. It is clear that ONR was wound up on 9 August 1999. As highlighted by counsel for the appellant, six months prior 9 August 1999 would be 9 February 1999. Accordingly, to fulfill condition (1), the respondent liquidator would have to establish by affidavit evidence that the two charges were created on or after 9 February 1999.

Findings Of The Court

[12] The affidavit affirmed by the Mr. Wong does not address this issue. Instead in paras. 8 and 9 of the supporting affidavit, Mr. Wong makes reference to the loan facilities having been granted on 4 May 1998 and the winding up order against OAB having been made on 4 August 1998. With respect, to fulfill condition (1), it is necessary for the respondent to establish that the two charges were created after 9 February 1999. The date of the winding up of OAB is irrelevant, in our opinion, in considering the applicability of ss. 223 and 293 of the Companies Act 1965 to be read with s. 53(1) of the Bankruptcy Act 1967 to the charges since we are concerned with the charges created by ONR and not OAB. Accordingly, since the two charges were created on 27 and 29 May 1998, dates well before the 9 February 1999 dateline, ss. 223 and 293 of the Companies Act 1965 to be read with s. 53(1) of the Bankruptcy Act 1967 do not



extend to the two charges created by ONR in favour of the appellant. Since the respondent failed to fulfill condition (1), on this ground alone, the respondent's motion ought to have been dismissed.

[13] Since substantial submissions were made by learned counsel for the appellant on all of the five conditions pronounced by Edgar Joseph Jr J, we would like to additionally express the view that the respondent's claim ought to have been dismissed on the additional ground that there is no evidence that ONR was indebted to the appellant bank. The evidence as highlighted earlier in this judgment only reveals that the loan facilities were granted to OAB, the parent company of ONR. With respect, the granting of facilities to the parent company OAB cannot result in the appellant bank being the creditor of ONR notwithstanding that OAB was the parent company of ONR. No evidence was led by the respondent for this court to lift the corporate veil nor were any submissions addressed to us on this issue. Accordingly the motion ought to have been dismissed on this additional ground, as well.

[14] Accordingly, we allowed the appeal with costs and set aside the decision of the High Court Judge. The respondent is hereby ordered to pay costs of RM30,000 representing costs of RM20,000 in respect of the proceedings in the High Court and RM10,000 as costs of this appeal. Deposit is to be refunded to the appellant.